SITI AISHA IBRAHIM

v.

GOH CHENG HWAI

FEDERAL COURT, PENANG
RAJA AZLAN SHAH CJ (MALAYA)
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 91 OF 1981]
5 MAY 1982

CIVIL PROCEDURE: *Pleadings - Failure to abide by - Whether fatal - Evidence in Court contrary to pleadings - Whether appellant was lawfully walking along proper side of the road, across the road or crossing the road - Whether respondent misled, prejudiced, embarrassed, surprised or led astray by appellant's evidence.*

CIVIL PROCEDURE: *Finding of fact - Whether proper for appellate Court to disturb finding of trial Court - Justified circumstances for appellate Court to arrive at different conclusion.*

This is an appeal against the decision of Arulanandom J who allowed an appeal by the respondent and dismissed the appellant's claim with costs against the finding of President, Sessions Court, Penang who held the respondent to be negligent and the appellant to be guilty of contributory negligence in a running down case.

Appellant's contention was that the learned Judge erred in law when he interfered with the finding of fact made by the learned President.

Respondent's counsel argued that on the pleadings the appellant had stated that the she was "lawfully walking along the proper side of the road" whereas in her evidence she said she was walking across the road and therefore failure to abide by her pleadings was fatal and her claim must be dismissed.

Held:

[1] Although the appellant pleaded on her statement of claim that she was "lawfully walking along the proper side of the road" in her evidence she clearly said that she was walking across the road. Moreover in her police report she stated that she was crossing the road. The respondent in his evidence stated that she was crossing the road from left to right.

[2] The respondent was therefore not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the appellant's pleading because from the very outset it was the contention of and the case for the respondent that the appellant was walking across the road and not along the road.

[3] An appellate Court may be justified in coming to a different conclusion if there is a valid reason to think that the trial Judge had not taken proper advantage of his having seen and heard the witnesses.

[4] The learned President correctly found as a fact that the respondent was negligent and that the appellant was herself not free from blame when she attempted to across the road without fully ascertaining that it was safe to do so.

[5] The Federal Court saw no valid reason to hold that the apportionment of liability 50-50 was unwarranted by the evidence.

[Appeal allowed with costs. Order made by the learned President restored.]

Cases referred to:
Esso Petroleum Co. Ltd. v. Southport Corporation [1956] 2 WLR 81
K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail [1981] 2 MLJ 10
Playing Cards (Malaysia) Sdn. Bhd. v. China Mutual Navigation Co. Ltd. [1980] 2 MLJ 182
Gammell v. Wilson & Ors.
Furness & Anor. v. B. & S. Massey Ltd. [1981] 1 All ER 578
Chan Peng Fook v. Kan Pak Lee [1974] 1 MLJ 197

Legislation referred to:
Civil Law Act 1956 (Cap 30), s. 8

For the appellant - Ajmer Singh
For the respondent - B. Mahesan

JUDGMENT

Abdul Hamid Omar FJ:

In an appeal by the respondent/defendant against the finding of the President Sessions Court, Penang that the respondent was negligent and the appellant/plaintiff was guilty of contributory negligence, Arulanandom J allowed the appeal and ordered that the appellant's claim be dismissed with costs. This appeal is against that decision of the learned Judge. We allowed the appeal and now give our reasons.

The main contention of the appellant is that the learned Judge erred in law when he interfered with the finding of fact made by the learned President.

On the other hand, counsel for the respondent argued that on the pleadings it was the appellant's case that at the time of the collision she was "lawfully walking along the proper side of the road" whereas in her evidence she said she was walking across the road. It is the respondent's contention that the failure to abide by her pleadings was fatal and the appellant's claim must therefore be dismissed. The case of *Menah binti Sulong @ Minah binti Sulong @ Aminah binti Sulong v. Lim Soo & Anor.* (Federal Court Civil Appeal No. 36 of 1970) is relied upon as authority that a decision should be in strict accordance with the pleadings. This is reflected in that part of the speech by Lord Radcliffe in *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] 2 WLR 81, 91 (HL) when he said -

> If an appellate Court is to treat reliance as pedantry or mere formalism I do not see what part they have to play in our trial system.

The case of *Esso Petroleum Co. Ltd. v. Southport Corporation* can clearly be distinguished from the present case and similarly the case of *Menah binti Sulong.* The former was a claim based on trespass, nuisance and negligence and it was necessary to determine first the essential issue the trial turned upon. In that case the plaintiffs conducted their case and confined their evidence upon certain further and better particulars. It was held at p. 82 that "since every allegation in the statement of claim was rightly decided by the trial Judge in a sense adverse to the foreshore owners, who had made no allegation of unseaworthiness, the ship-owners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings **nor made against them in the course of trial**." (Emphasis is ours).

The latter case may also be distinguished from the instant case and this is clear from the judgment of Ong CJ delivering the judgment of the Court that both in the plaintiff's statement of claim and "repeatedly in her evidence she stated that she had alighted from the bicycle and was standing on the grass verge when the car knocked her down, being on its wrong side of the road whilst the defendants alleged that bicycle came out without stopping at the junction."

The case under consideration is simple and straightforward. Although the appellant pleaded on her statement of claim that she was "lawfully walking along the proper side of the road", in her evidence she clearly said that she was walking across the road. Moreover in her police report included in the agreed bundle of documents (Ex. P1) at the trial she stated that she was crossing the road. Indeed the defendant in his defence and his evidence stated that the plaintiff was crossing the road from left to right.

It is clear therefore that the defendant was not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading because from the very outset it was the contention of and the case for the defendant, that the plaintiff was walking across the road and not along the road.

On appeal the learned Judge allowed the appeal but for different reasons. He appreciated that the plaintiff's evidence was contrary to her pleadings, but in view of other findings he did not think it necessary to lay too much emphasis on technicalities.

This Court in the case of *K.E.P. Mohamed Ali v. KEP. Mohamed Ismail* [1981] 2 MLJ 10, the learned Chief Justice Raja Azlan Shah delivering the judgment of the Court at p. 12 said:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been properly excluded.

In another case *Playing Cards (Malaysia) Sdn. Bhd. v. China Mutual Navigation Co. Ltd.* [1980] 2 MLJ 182, this Court, Abdoolcader J delivering the judgment of the Court, said that "although the pleadings in this case were not very precise, both military truck, in which he was travelling, and a motor lorry. The administrator of his estate made a claim in the High Court for loss of future earnings under s. 8 of the Civil Law Act, Cap. 30 and relied on the decision of the House of Lords in *Gammell v. Wilson & Ors.*; *Furness & Anor. v. B. & S. Massey Ltd.* [1981] 1 All ER 578.

The High Court dismissed the claim. The learned trial Judge in his judgment alluded to certain reservations of certain Law Lords in *Gammell's* case and the "immense practical difficulties in giving effect to the decision." After reviewing some of the evidence, he stated at the end of the judgment as follows:

> I found the available evidence for assessment of damages meagre and contradictory. On the evidence I was unable to say what the deceased was going to do or how much he would earn in his normal working lifespan. It was not possible therefore even to begin to make an estimate of the probable future earnings of the deceased. So then, it was impossible to assess a fair compensation for the 'lost years'. I therefore dismissed the plaintiff's claim.

Against that judgment this appeal was brought. We allowed the appeal with costs. We now give our reasons.

As the claim is made under s. 8 of the Civil Law Act, Cap. 30 it is necessary to set out the relevant parts of that section and they are as follows:

(1) Subject to the provisions of this section, on the death of any person after the 10th day of June, 1940, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:

Evidence reveals that in the instant case the respondent saw the appellant an old lady some 30 feet away about to cross the road and the possibility of danger was therefore apparent. That being the case a special duty was created to take precautions and the failure by the respondent to take them was negligence (see *Chan Peng Fook v. Kan Pak Lee* [1974] 1 MLJ 197, per Hashim J). The learned President, in our view, correctly found as a fact that the respondent was negligent and that the appellant was herself not free from blame when she attempted to cross the road without fully ascertaining that it was safe to do so. We see no valid reason to hold that the apportionment of liability 50-50 was unwarranted by the evidence.

For these reasons, we allowed the appeal with costs and restored the order made by the learned President.

Also found at [1982] CLJ 544